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No. 94-1474

Supreme Court, U. S.

FILED

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In The  
**Supreme Court of the United States**  
October Term, 1994

STATE OF IDAHO; PHIL BATT, GOVERNOR; PETE  
CENARRUSA, SECRETARY OF STATE; ALAN G. LANCE,  
ATTORNEY GENERAL; J.D. WILLIAMS, CONTROLLER;  
ANNE FOX, SUPERINTENDENT OF PUBLIC INSTRUCTION;  
KEITH HIGGINSON, DIRECTOR, DEPT. OF WATER  
RESOURCES, each individually and in his official capacity;  
IDAHO STATE BOARD OF LAND COMMISSIONERS; and  
IDAHO STATE DEPARTMENT OF WATER RESOURCES,

v.

*Petitioners,*

COEUR d'ALENE TRIBE, in its own right and as the  
beneficially interested party subject to the trusteeship  
of the UNITED STATES OF AMERICA; ERNEST L.  
STENSGAR, LAWRENCE ARIPIA, MARGARET JOSE,  
DOMNICK CURLEY, AL GARRICK, NORMA PEONE and  
HENRY SIJOHN, individually, in their official capacity and  
on behalf of all enrolled members of COEUR D'ALENE TRIBE,

*Respondents.*

IN THE MATTER OF THE OWNERSHIP OF THE  
BEDS AND BANKS AND ALL WATERS OF ALL  
NAVIGABLE WATERCOURSES WITHIN THE 1873  
COEUR d'ALENE RESERVATION BOUNDARY.

**Brief In Opposition To Petition For A Writ Of Certiorari  
To The United States Court Of Appeals For The Ninth Circuit**

**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

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## PETITIONER'S QUESTIONS PRESENTED

1. The Eleventh Amendment bars federal courts from hearing quiet title actions brought by Indian tribes against a State to adjudicate title to, and gain possession of, waters and submerged lands held by the State under the equal footing doctrine of the United States Constitution. The issue presented by this case is whether a federal court may nonetheless hear an action against state officers for injunctive and declaratory relief when such relief requires adjudication of the State's title and will deprive the State of all practical benefits of ownership of the disputed waters and submerged lands.

2. The President, absent an express delegation of Congress' exclusive authority over public lands, cannot convey title of uplands to Indian tribes. *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942). The issue presented in this case is whether the President, acting without express congressional authority, can nonetheless convey title of the beds and banks of navigable waters to an Indian tribe, thereby defeating a State's entitlement to such lands under the equal footing doctrine of the United States Constitution.

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STATE OF IDAHO; PHIL BATT, GOVERNOR; PETE CENARRUSA, SECRETARY OF STATE; ALAN G. LANCE, ATTORNEY GENERAL; J.D. WILLIAMS, CONTROLLER; ANNE FOX, SUPERINTENDENT OF PUBLIC INSTRUCTION; KEITH HIGGINSON, DIRECTOR, DEPT. OF WATER RESOURCES, each individually and in his official capacity; IDAHO STATE BOARD OF LAND COMMISSIONERS; and IDAHO STATE DEPARTMENT OF WATER RESOURCES,

v.

*Petitioners,*

COEUR d'ALENE TRIBE, in its own right and as the beneficially interested party subject to the trusteeship of the UNITED STATES OF AMERICA; ERNEST L. STENSGAR, LAWRENCE ARIPIA, MARGARET JOSE, DOMNICK CURLEY, AL GARRICK, NORMA PEONE and HENRY SIJOHN, individually, in their official capacity and on behalf of all enrolled members of COEUR D'ALENE TRIBE,

*Respondents.*

IN THE MATTER OF THE OWNERSHIP OF THE BEDS AND BANKS AND ALL WATERS OF ALL NAVIGABLE WATERCOURSES WITHIN THE 1873 COEUR d'ALENE RESERVATION BOUNDARY.

Brief In Opposition To Petition For A Writ Of Certiorari  
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BRIEF IN OPPOSITION TO PETITION  
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The Respondents respectfully request the Court deny the petition for writ of certiorari seeking review of the Court of Appeals for the Ninth Circuit's opinion in this case. 42 F.3d 1244.

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### ADDITIONAL CONSTITUTIONAL PROVISION INVOLVED

In addition to the Property Clause and the Eleventh Amendment to the United States Constitution set out by the Petitioner, the following Idaho Constitutional provision is applicable:

[A]nd the people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; . . .

Idaho Constitution, Article XXI § 19.

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### STATEMENT OF THE CASE

#### 1. Record and Facts

This is an action by a federally recognized Indian Tribe and its duly elected leaders against a State, state agencies and state officers. At issue is ownership of the

beds and banks and waters of various navigable watercourses. The relief requested below was to quiet title and for declaratory and injunctive relief.

The State of Idaho and various state agencies and officials were Defendants below and are Petitioners before the Court. The Coeur d'Alene Tribe and tribal officers were Plaintiffs below, Respondents here and are referred to collectively as "Tribe." The Tribe brings this action "as the beneficially interested party subject to the trusteeship of the United States." This is important because of the interrelationship between this case and *United States v. Idaho*, No. 94-0328 (U.S.D. Ct. ID), App. at 22-61, discussed below.<sup>1</sup>

This case is before the Court on the skimpiest of records. There is only a Complaint, App. at 3-14 and a FRCP 12(b) Motion to Dismiss, App. at 15-17. There is no Answer, no affidavit, no discovery and no testimony.

In its Statement of the Case the Petitioners repeatedly and improperly refer to factual and other matters that are not part of the record of this case and therefore not properly before the Court. Petition at 3-7.

#### 2. Proceedings Below

The proceedings in the District Court were heard on a FRCP 12(b) Motion to Dismiss App. at 15-18. The

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<sup>1</sup> Various pleadings from *United States v. Idaho* were filed in this case as an appendix to a document titled Notice of Filings which was filed in the Court of Appeals. App. 19-61.



decisions of the District Court and the Court of Appeals are set out in the Petitioners' Appendix at 1-28 and 29-49.

*Petitioners' Eleventh Amendment Issue.* The District Court held that the Eleventh Amendment precluded that court from considering the claim to quiet title and for other relief against the State and state agencies. The District Court, without factual record, went to the merits on the 12(b) motion, found no violation of federal law, and dismissed the Tribe's case. *Coeur d'Alene Tribe of Idaho v. State of Idaho*, CV-91-437-HLR (U.S.D.Ct. Idaho), Petitioner's App. 29-49.

The Court of Appeals agreed the Eleventh Amendment precluded the District Court from considering the claims to quiet title and for other relief against the State and state agencies. As to the officials, the Court of Appeals applied the *Ex Parte Young*, 209 U.S. 123 (1908) analysis and the three-part test of *State of Florida, Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). The Court of Appeals held the requested relief of enjoining state officials from interfering with tribal interests in the property was not equivalent to payment of funds from the state treasury and therefore not barred by the Eleventh Amendment. The Court of Appeals carefully refrained from exercising jurisdiction to quiet or otherwise adjudicate Petitioners' title. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 1-23.

*Petitioners' Executive Order Issue* – The District Court held, on the 12(b) motion and the minimal record described above, that the 1873 Executive Order was insufficient to overcome the strong presumption that the submerged lands had passed to the State at statehood under the

equal footing doctrine. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 37-47.

The Court of Appeals did not rule on whether the Executive Order was sufficient to convey the submerged lands to the Tribe. Rather, the Court of Appeals ruled only that "it was conceivable that the Tribe could prove facts that would entitle it to the relief sought, . . ." and remanded the case for trial. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 27.

*Rulings Below on Issues Outside the Petition.* The District Court totally failed to address Count 1 of the Tribe's Complaint regarding aboriginal title claims to the beds, banks and waters and yet dismissed the entire action. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 29-49. The Court of Appeals held this to be error, reversed and remanded for trial to consider the aboriginal title issues and facts. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 28.

### 3. Relation to *United States v. Idaho*.

Between the time this case was argued to the Court of Appeals and the issuance of its decision, the United States, as trustee for the Tribe, sued the State of Idaho in federal court over the same basic matter at issue in this case.<sup>2</sup> App. at 22-32.

<sup>2</sup> The United States' Complaint in *United States v. Idaho* is against the State of Idaho only. The Complaint is not as expansive as the Tribe's Complaint in this case. The United States' Complaint is to quiet title to only a portion of the beds and banks of Lake Coeur d'Alene, while the Tribe's Complaint includes a larger area, as well as water and aboriginal title.



The State of Idaho (Petitioner in this case) answered, admitted jurisdiction, and *counterclaimed*. App. at 33-44. The counterclaim was more expansive than the U.S.'s Complaint.<sup>3</sup> App. at 41.

The Tribe moved to intervene (App. at 50-51) and filed a proposed Complaint containing the same issue raised in this case. App. at 52-61. That Motion is still pending.

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### REASONS FOR DENYING THE WRIT

The granting of certiorari is reserved for "special and important cases." S.Ct. Rule 10.1. In an era when petitions for certiorari outnumber those that can be granted by over 30 to 1, the granting of Writs of Certiorari should be reserved for those cases which are fully developed, will have a broad impact, and in which resolution of the Questions Presented will make a difference in the ultimate outcome. This is not such a case.

This section is broken down into seven different reasons why the certiorari should be denied. In a general way, those reasons are: 1) the Eleventh Amendment Question Presented is undercut by the Petitioner's own actions in a related case (filing a counterclaim in the

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<sup>3</sup> The Counterclaim was by the State of Idaho itself. It asks the federal court for a judgment "quieting its title to the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River within the Coeur d'Alene Reservation." App. at 41 § 6.6(1). This places at issue ownership of the entire lake because if the entire lake is owned by the United States in trust for the Tribe it is "within the Coeur d'Alene Reservation."

federal case of *United States v. Idaho*, No. 94-0328 (U.S.D. Ct. ID)), which has resulted in the Petitioner voluntarily submitting itself to the jurisdiction of the federal court against a party in privity with the Tribe to resolve the same basic issues of this case, 2) there are unique questions of law and unresolved factual matters that complicate the two Questions Presented and narrow their impact to the unique factual and legal issues in this case, and 3) there are no conflicts with decisions of this Court or the various Circuits.

These reasons are more fully developed in the following seven subsections.

1. The Eleventh Amendment Question Presented should not be considered because Petitioner State of Idaho has voluntarily subjected itself to federal court jurisdiction concerning this subject matter by filing a counterclaim in *United States v. Idaho* against the United States which is in privity with the Tribe as its trustee.

The Question Presented regarding the Eleventh Amendment concerns federal court jurisdiction over an action against state officials by an Indian tribe seeking to halt interference with the tribe's property. This question cannot be decided in a vacuum.

The impact of the related case of *United States v. Idaho*, 94-0328 (D. Idaho), App. at 22-61, must be considered. Of particular importance is the Petitioner's (State) *voluntary* submission to federal court jurisdiction by filing its counterclaim against the Tribe's trustee regarding the dominant issue of both cases. App. at 41 § 6.6(1).

Indian tribes and the United States are in close privity as a result of their trust relationship. A judgment binding the United States regarding Indian rights also binds the tribe even when the tribe is not a party to the action. *Arizona v. California*, 460 U.S. 605, 614 (1983); *Nevada v. United States*, 463 U.S. 110, 135 (1983).

Because of this privity, a state should not be invoking the jurisdiction of the federal court against the trustee and then seek the protection of the Eleventh Amendment in a simultaneous action by the beneficiary when the two suits concern essentially the same subject matter.

The Eleventh Amendment Question Presented should not be considered because it will not make a difference in the ultimate outcome of the merits of the case due to the Petitioner's counterclaim in *United States v. Idaho*.

2. **The Eleventh Amendment Question Presented cannot be reached because Petitioner State of Idaho has defined its own sovereignty in a limited way so that a quiet title action presents no claim against the Petitioner's sovereignty.<sup>4</sup>**

The rationale behind the judicial expansion of the Eleventh Amendment doctrine is that the judicial

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<sup>4</sup> This argument regarding state officials is identical to the Cross-Petition's argument regarding the State itself. The state official argument is presented in this Response because it simply forms a different basis under which the Court of Appeals could have reached the same conclusion without modifying its judgment. *Chevron v. NRDC*, 467 U.S. 837, 842 n. 7 (1984). The argument as to the State is set out as a Cross Petition because it would alter the judgment if decided in the Tribe's favor. *Federal Energy Administration v. Algonquin SNG*, 426 U.S. 548, 560 n. 11 (1976).

authority of Article III courts is limited by the breadth of a state's sovereignty.

[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the plan of convention.

*Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991).

If an action directly impacts the *sovereignty* of a state, the Eleventh Amendment bars federal court jurisdiction. But if the *sovereignty* of a state is not impacted, the rationale explained in *Blatchford* does not come into play. The ability of a sovereign to define the scope of its own sovereignty is the most fundamental function of that power.

The Petitioner has defined and limited its sovereignty in a unique way by declaring that quiet title actions regarding property in which the state claims an interest present no claim against the state's sovereignty.

A suit to quiet title to land allegedly owned by appellants and to which the Board of Education of the State of Idaho allegedly assert a claim is not a claim against the Board of Education, or the State, to which it can interpose sovereign immunity as a defense. (citations omitted)



The appellants by the proceeding [to quiet title] are asserting no claim against the sovereignty, but are attempting to retain what they allegedly own.

Hence the contention that such [quiet title] proceedings deprives the State, its officials or boards, of sovereign rights of immunity, is without merit.

*Lyon v. State*, 283 P.2d 1105, 1106 (Idaho 1955).

This argument is discussed in greater detail in the Cross-Petition. Since a quiet title action presents *no claim against the sovereignty* of the state, there is no basis for invoking the Eleventh Amendment to shield state officials from federal court suits regarding the property. The limitations on the Petitioner's sovereignty prevents the Eleventh Amendment Question Presented from ever being reached.

**3. There is no conflict between the Court of Appeals' Eleventh Amendment decision and prior decisions of this Court or the other Circuits.**

The Court of Appeals meticulously followed all of the prior Eleventh Amendment decisions of this Court, especially *Ex Parte Young*, 209 U.S. 123 (1908) and its progeny, *State of Florida v. Treasure Salvors*, 458 U.S. 670 (1982) and *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). Although the Tribe had sought broad relief against a broad range of Petitioners, the Court of Appeals was careful to narrow the relief (prospective relief only) against a narrow group of Petitioners (officials only). *Coeur d'Alene Tribe v. Idaho*, Petitioner's

App. at 4-23. The Court of Appeals was especially careful to limit the relief so there would be no federal court adjudication of Petitioner's claimed title to the property. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 22-23.

It would be unnecessarily repetitive, and a disservice to the Court of Appeals' careful analysis, to attempt to restate it here. After limiting the relief available because of the dictates of this Court's various Eleventh Amendment decisions, the Court of Appeals recognized the unique role of the federal judiciary in our system of federalism concerning tribal/state property disputes when it stated:

We will not refuse to enforce the federal rights of Indian tribes against action by state officials merely because we cannot afford them complete relief.

*Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 23.

There is no conflict between the Court of Appeals' decision and the decisions of this Court.

Nor is there any conflict between the Court of Appeals' decision and decisions of the other Circuits. An obvious distinction is that none of the cases cited by the Petitioner involves a dispute with Indian tribes. *Fitzgerald v. Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16 (1st Cir. 1989), *Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665 (7th Cir. 1992), *Toledo, Peoria & Western R.R. Co. v. Illinois Dep't. of Transportation*, 744 F.2d 1296, 1299 (7th Cir. 1984), *John G. & Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667 (5th Cir. 1994), *Harrison v. Hickel*, 6 F.3d 1347, 1348 (9th Cir. 1993). *Harrison* involved a suit by an Alaska Native, not a tribe. It was



also distinguished by the Court of Appeals on other grounds. As the Court of Appeals noted "states cannot provide a remedy for the taking of Indian lands that are held pursuant to federal law." *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 17 n.8.

The Court of Appeals carefully discussed why *Toledo, Peoria & Western* and *Harrison* were not applicable. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 17. The Court of Appeals noted *Fitzgerald* was inapplicable for the same reason as *Toledo, Peoria & Western*, (no claimed violation of federal law). *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 18.

The Court of Appeals was careful to follow this Court's ruling in *Treasure Salvors* and the Fifth Circuit's handling of that case on remand. *State of Florida, Dept. of State v. Treasure Salvors*, 689 F.2d 1254, 1256 (5th Cir. 1982), (*Treasure Salvors II*). Petitioner's App. at 18-23.

To the extent that *Fitzgerald* or the Fifth Circuit's decision in *Mauro* might be read differently, the Court of Appeals properly relied on the Fifth Circuit's handling of *Treasure Salvors II* on remand from this Court. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 18-23.

There is no conflict between the Court of Appeals' decision and the other Circuits. To the extent any other Circuit decision may be read in conflict, this is not the case to resolve that conflict because of the unique, complicating factors discussed herein.

**4. The Eleventh Amendment Question Presented is not an important, unsettled question of federal law, especially in light of the unique limitations resulting from the Petitioner's Counterclaim in *United States v. Idaho* and definition of its own sovereignty.**

In recent years this Court has issued numerous Eleventh Amendment decisions: *Employees v. Missouri Department of Public Health*, 411 U.S. 279 (1973), *Edelman v. Jordan*, 415 U.S. 651 (1974), *Quern v. Jordan*, 44 U.S. 332 (1979), *State of Florida v. Treasure Salvors*, 458 U.S. 670 (1982), *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), *Atascadero State Hospital v. Scandon*, 473 U.S. 234 (1985), *Kentucky v. Graham*, 44 U.S. 159 (1985), *Welch v. Texas Department of Highways*, 483 U.S. 468 (1987), *Port Authority Trans Hudson Corporation v. Feeney*, 495 U.S. 299 (1990), *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

The Eleventh Amendment protection afforded states, state agencies, and to a lesser extent state officials, can hardly be considered an area of federal law "which has not been, but should be, settled by this Court." S.Ct. Rule 10.1(c). There is already a well developed body of Eleventh Amendment law.

The Eleventh Amendment Question Presented by Petitioner is undercut by the limitation of its own sovereignty that quiet title actions present no claim against the sovereign of the state. *Lyon, Roddy v. State*, 139 P.2d 1005 (1943). The Petitioner's position is likewise undercut by its Counterclaim in *United States v. Idaho* where it voluntarily submitted itself to the jurisdiction of the court

regarding essentially the same issues against the Tribe's trustee.

These reduce the Eleventh Amendment Question Presented to a mere abstract question of academic interest. This is not the sort of case which merits serious consideration for certiorari in this era of limited judicial resources.

5. **The meager factual record and the numerous controlling legal issues previously unconsidered must be more completely developed before consideration of the Executive Order Issue Presented is proper.**

In the Executive Order Question Presented the Petitioner states a clean, academic issue of ownership of submerged lands simultaneously claimed by a state under the equal footing doctrine and an Indian Tribe under an Executive Order. The Petitioner discusses the Executive Order issues as if the Tribe's title to the submerged land rests solely on the Executive Order. Petition at 18-25. The Petitioner fails completely to discuss the various other factual and legal considerations that demonstrate the Tribe's ownership of the beds, banks and waters at issue. At this stage of the proceeding there is nothing clean or academic about the ownership issue.

The record in this case is very sparse. It consists of only a Complaint and a Motion to Dismiss. There is not even a denial by the Petitioner of tribal ownership. App. at 3-8.

The Court of Appeals did not decide the ownership issue. It only remanded the case to the District Court for the proper development of a factual record and to sort

through the various legal issues. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 27-28. It is well settled that in considering FRCP 12(b)(6) motions the allegations of the Complaint are to be taken as true. *United States v. Mississippi*, 380 U.S. 128, 143 (1965).

The Complaint in *Coeur d'Alene Tribe v. Idaho* states:

The Coeur d'Alene Tribe's beneficial interest, subject to the trusteeship of the United States, in the beds, banks and waters at issue herein has never been ceded by the Coeur d'Alene Tribe, or otherwise extinguished or conveyed by the United States or transferred by operation of law out of tribal ownership.

App. at 9-10 § 24.

For the purpose of a FRCP 12(b)(6) motion, this allegation must be taken as true. *United States v. Mississippi*. This alone defeats the Petitioner's argument.

There are also a myriad of unresolved legal issues that have to be resolved before the Petitioner's Executive Order Question Presented can even be considered. These include:

- 1) Petitioner's disclaimer of interest in Indian lands and the relinquishment to Congress of control over such lands, Idaho Constitution, Art. XXI § 19;
- 2) the effect of the pre-statehood, Congressionally initiated, 24 Stat. 44, 1887 Agreement regarding the Coeur d'Alene Reservation between the Coeur d'Alene Tribe and the United States, 26 Stat. 712;
- 3) the effect of pre-statehood Congressional recognition of the Tribe's title to its Reservation



in a statute conditionally granting a railroad right-of-way through the reservation if consented to by the Tribe and upon payment to the Tribe by the railroad, 25 Stat. 160;

4) the relation back of the 1891 (post-statehood) ratification to the 1887 Agreement, 26 Stat. 160, especially in light of the Idaho Constitution's Indian Disclaimer Clause, Art. XXI § 19, and *Northern Pacific v. Wismer*, 246 U.S. 283 (1918) (holding that the effective date of an Indian reservation related back to the date a tribe enters into an agreement with the United States).

5) the Idaho law in effect at both the time of establishment of the Coeur d'Alene Reservation and statehood that the riparian owner (in this case the Tribe), *not the state*, owned the beds and banks of navigable watercourses. *Johnson v. Johnson*, 107 P. 47 (Idaho 1910), *Donovan-Hopka-Ninneman v. Hope Lumber*, 194 F. 643, 648-9 (9th Cir. 1912), *United States v. Ladley*, 4 F. Supp. 580, 582 (D. Idaho 1933).

These complex legal issues were all raised below, but were rendered unnecessary to resolve on appeal when the Court of Appeals remanded the case.

There are also a myriad of facts supporting the allegations of § 24 of the Complaint, App. at 9-10, recognized by the Court of Appeals' in its statement that "[I]t is conceivable that the Tribe could prove facts that would entitle it to the relief sought, . . . ." *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 27. These facts must be taken as true at the 12(b)(6) motion steps of these proceedings. *United States v. Mississippi*, 380 U.S. 128, 143 (1965).

After the legal issues have been fully developed and the factual issues have been resolved, there may come a day that this case would be appropriate for consideration by this Court. But in its present state of development, this case is not an appropriate candidate for the issuance of a Writ of Certiorari. The Executive Order Question Presented cannot be reached on this record.

**6. There is no conflict between the Court of Appeals' Executive Order decision and the prior decisions of this Court.**

The thrust of the Executive Order Question Presented is that the Property Clause vests exclusive authority over public lands in Congress and that since there was no Congressional conveyance, the submerged lands passed to the Petitioners under the equal footing doctrine.

Petitioners claim the Court of Appeals' decision is in conflict with *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987) and *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942). There are four reasons why there is no such conflict.

The first reason why there is no conflict is the extensive Congressional involvement and recognition of the Coeur d'Alene's title discussed above.

The second reason why there is no conflict is the formal recognition by Congress of the Coeur d'Alene Reservation in the 1887 Agreement. Although this Agreement was not formally ratified until 1891, a year after statehood, the Tribe's title to its reservation was statutorily recognized by Congress in 1888 (2 years prior to



statehood). In the statute conditionally granting a railroad right-of-way through the Coeur d'Alene Reservation Congress stated:

*That the right of way is hereby granted, as hereinafter set forth, to the Washington and Idaho Railroad Company, a corporation organized and existing under the laws of the Territory of Washington, for the extension of its railroad through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation. . . .*

*That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and provide the time and manner for the payment thereof. . . .*

*Provided, That the consent of the Indians to said right of way shall be obtained by said railroad company in such manner as the Secretary of the Interior shall prescribe, before any right under this act shall accrue to said company.*

25 Stat. 160 (1888) (emphasis added).

The ratification of the 1887 Agreement relates back to the date of the Agreement. See *Northern Pacific Railroad v. Wismer*, 246 U.S. 283 (1918) (holding that the effective date of an Indian reservation relates back to the date a tribe enters an agreement with the United States). In this case such relation back is especially appropriate because of the Petitioner's disclaimer of all interest in Indian lands in Art. XXI § 19 of its Constitution. The railroad right-of-way act is especially critical because it clearly shows that Congress recognized the Tribe held title to the Coeur d'Alene Reservation which could not be taken

without consent and compensation, even for such a public purpose as railroad expansion.

The Petitioner failed to discuss this right-of-way statute in its argument regarding whether there can be a compensable interest in an Indian reservation created by Executive Order. This railroad right-of-way statute totally refutes the Petitioner's argument regarding *Sioux Tribe v. U.S.*, 316 U.S. 317 (1942), Petition at 22-24.

The third reason why there is no conflict is at the time the Coeur d'Alene Reservation was established and at the time of statehood, the Petitioner did not even claim ownership of the bed and banks of navigable watercourses. *Johnson v. Johnson*, 95 P. 499 (Idaho 1908), *Donovan-Hopka-Ninneman v. Hope Lumber*, 194 F. 643 (9th Cir. 1912), *United States v. Ladley*, 4 F. Supp. 580 (D. Idaho 1933).

Under the law of Idaho at the time of statehood, and when the patents were issued to the allottees, the riparian owner upon a stream, both *navigable* and non-navigable, takes title to the bed of the stream. . . .

*United States v. Ladley*, 4 F. Supp. 580, 582 (D. Idaho 1933) (emphasis added).

At the time of Petitioner's statehood the Tribe was the riparian owner to all of the navigable watercourses at issue. The beds and banks at issue at the time of statehood were completely surrounded by Tribal lands.

Since the Petitioner did not claim ownership of the beds and banks at the time of statehood, and since it disclaimed all interest in Indian lands, the Petitioner has no basis to claim present ownership, let alone to claim

there is a conflict with prior decisions of this Court in which none of the above elements were present.

The fourth reason why there is no conflict is that the Petitioner's argument is based on the assumption that Executive Order Indian Reservations are somehow inferior to Treaty Indian Reservations. This Court, however, has held just the opposite.

We can give but short shrift at this late date to the argument that the reservations of either land or water are invalid because they were originally set apart by the Executive.

*Arizona v. California*, 373 U.S. 546, 598 (1963). See also *Antoine v. Washington*, 420 U.S. 194, 198, n.6 (1975).

It is the Petitioners' arguments which would create conflicts with prior holdings of this Court. The Court of Appeals' decision in this case creates no conflict.

**7. The Petition should be denied because it is not dispositive of the case.**

This entire Petition is similar to an interlocutory appeal. Regardless of how the Executive Order Question Presented is decided, the case will ultimately return to the trial court for resolution of other unresolved issues.

The Court of Appeals specifically remanded the aboriginal title issue back to the District Court. *Coeur d'Alene Tribe v. Idaho*, Petitioner's App. at 28. The Petitioner has presented no question concerning aboriginal title in its Petition. As such the aboriginal title issue will return to the District Court regardless of the outcome of this Executive Order Question Presented.

The same is true of the water rights issue raised in both Counts 1 and 2 of the Complaint. App. pp. 3-14.

Finally, there is still the companion case of *United States v. Idaho* at the District Court level.

Judicial economy and limited judicial resources counsel against granting a Petition of such an interlocutory nature.

---

## CONCLUSION

The Eleventh Amendment Question Presented should not be considered because:

1. The Petitioner has voluntarily invoked the jurisdiction of the federal court against the Tribe's trustee concerning essentially the same subject matter;
2. The Petitioner has defined its own sovereignty so that a quiet title action presents no claim against the sovereignty of the state. Consequently, the Eleventh Amendment does not bar the action because the action presents no claim against the Petitioner's sovereignty;
3. There is no conflict with any decisions of the Court or the other Circuits; and
4. The Eleventh Amendment is a well-settled area of federal law.

The Executive Order Question Presented should not be considered because:

1. The factual record is almost non-existent and the legal issues regarding ownership



have not been adequately developed by the courts below.

2. There is no conflict with any decisions of this Court or the other Circuits; and
3. The Question is not dispositive.

It is respectfully requested that the Petition for Writ of Certiorari be denied. This case can then be remanded to the District Court to develop a suitable procedure for considering this case and *United States v. Idaho* on the merits.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

COEUR D'ALENE TRIBE OF	)	No. 92-36703
IDAHO, in its own right and as	)	
the beneficially interested party	)	D.C. No. CV
subject to the trusteeship of the	)	91-437-HLR
UNITED STATES OF AMERICA;	)	
ERNEST L. STENSGAR;	)	ORDER
LAWRENCE ARIPIA; MARGARET	)	(Filed
JOSE'; DOMNICK CURLEY; AL	)	Dec. 29, 1993)
GARRICK; NORMA PEONE;	)	
HENRY SIJOHN, individually, in	)	
their official capacity and on	)	
behalf of all enrolled members of	)	
the COEUR D'ALENE TRIBE OF	)	
IDAHO,	)	
Plaintiffs-Appellants,	)	
v.	)	
STATE OF IDAHO; CECIL D.	)	
ANDRUS, Governor; PETE	)	
CENARRUSA, Secretary of State;	)	
LARRY ECHOHAWK, Attorney	)	
General; J.D. WILLIAMS, Auditor;	)	
JERRY EVANS, Superintendent of	)	
Public Instruction; KEITH	)	
HIGGINSON, Director, Dept. of	)	
Water Resources, each individually	)	
and in his official capacity;	)	
IDAHO STATE BOARD OF LAND	)	
COMMISSIONERS; IDAHO STATE	)	
DEPARTMENT OF WATER	)	
RESOURCES,	)	
Defendants-Appellees.	)	



App. 2

It is ordered that appellants' motion of February 23, 1993, to augment the excerpts of record is granted.

It is further ordered that this court take judicial notice of the Idaho Organic Act, the Idaho Constitution, the Indian Claims Commission opinion, and the order and transcript from *Coeur d'Alene Tribe v. Gulf, et al.*

Appellant's motion of December 16, 1992, to supplement the record is otherwise denied.

Appellees' motion to strike all portions of the Appellants' Opening Brief referring to the proffered supplemental material will be ruled on after oral argument.

FOR THE COURT

CATHY A. CATTERSON  
CLERK OF COURT

/s/ Gwen Baptiste  
By: Gwen Baptiste  
Deputy Clerk

App. 3

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

IN THE MATTER OF THE )  
OWNERSHIP OF THE BEDS AND )  
BANKS AND ALL WATERS OF )  
ALL NAVIGABLE WATER )  
COURSES WITHIN THE 1873 )  
COEUR D'ALENE RESERVATION )  
BOUNDARY. )

COEUR D'ALENE TRIBE OF )  
IDAHO, in its own right and as )  
the beneficially interested party )  
subject to the trusteeship of the )  
UNITED STATES OF AMERICA; )  
ERNEST L. STENSGAR, )  
LAWRENCE ARIPIA, MARGARET )  
JOSE', DOMNICK CURLEY, AL )  
GARRICK, NORMA PEONE and )  
HENRY SIJOHN, individually, in )  
their official capacity and on )  
behalf of all enrolled members of )  
the COEUR D'ALENE TRIBE OF )  
IDAHO, )

Plaintiffs, )

App. 4

vs.	)	CASE NO.
STATE OF IDAHO; CECIL D.	)	CIV 91-0437-
ANDRUS, GOVERNOR; PETE	)	<u>N-HLR</u>
CENARRUSA, SECRETARY OF	)	COMPLAINT
STATE; LARRY ECHOHAWK,	)	(13) QUIET
ATTORNEY GENERAL; J.D.	)	TITLE
WILLIAMS, AUDITOR; JERRY	)	(9) CIVIL
EVANS, SUPERINTENDENT OF	)	RIGHTS
PUBLIC INSTRUCTION; KEITH	)	
HIGGINSON, DIRECTOR, DEPT.	)	
OF WATER RESOURCES; each	)	(Filed
individually and in his official	)	Oct. 15, 1991)
capacity; IDAHO STATE BOARD	)	
OF LAND COMMISSIONERS; and	)	
IDAHO STATE DEPARTMENT OF	)	
WATER RESOURCES;	)	
Defendants.	)	

I. PRELIMINARY STATEMENT

1. This is an action by a recognized Indian tribe and its members regarding ownership and use of various beds and banks of navigable water courses and all waters. The action is based on theories of aboriginal or Indian title and on a specific reservation of title by the United States. The beds and banks at issue are those of all navigable watercourses within the 1873 Coeur d'Alene Reservation boundary. The waters at issue are all waters within the 1873 Coeur d'Alene Reservation boundary. The action seeks to quiet the Coeur d'Alene Tribe of Idaho's title in the beds, banks and waters at issue herein, declare that they are for the exclusive use and occupancy and quiet enjoyment of the Coeur d'Alene Tribe and its

App. 5

members and enjoin the defendants from taking any action in violation of those rights.

II. JURISDICTION

2. The Court has jurisdiction over this matter pursuant to 28 USC 1331, 1343(4) and 1362.

III. PARTIES

3. The COEUR D'ALENE TRIBE OF IDAHO is an Indian tribe whose governing body is duly recognized by the Secretary of the Interior. It is the beneficially interested party subject to the trusteeship of the United States of America in certain circumstances.

4. ERNEST L. STENSGAR, LAWRENCE ARIPIA, MARGARET JOSE', DOMNICK CURLEY, AL GARRICK, NORMA PEONE and HENRY SIJOHN are all a) enrolled members of the Coeur d'Alene Tribe of Idaho; b) duly elected members of the Coeur d'Alene Tribal Council, the governing body of the Coeur d'Alene Tribe of Idaho; c) citizens of the United States; and 4) residents of the Coeur d'Alene Indian Reservation in the UNITED STATES OF AMERICA.

5. STATE OF IDAHO is one of the 50 states within whose exterior boundary is located the Coeur d'Alene Indian Reservation and the beds, banks and waters at issue herein.

6. GOVERNOR CECIL D. ANDRUS is the chief executive officer of the STATE OF IDAHO, chairman of the BOARD OF LAND COMMISSIONERS, and pursuant to



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67-4304 is the trustee of a 1,000,000 acre foot water right unlawfully issued to him in Lake Coeur d'Alene.

7. PETE CENARRUSA is the SECRETARY OF STATE of the State of Idaho and as such is a member of the State Board of Land Commissioners.

8. LARRY ECHOHAWK is the ATTORNEY GENERAL of the State of Idaho and as such is a member of the State Board of Land Commissioners.

9. JERRY EVANS is the SUPERINTENDENT OF PUBLIC INSTRUCTION of the State of Idaho and as such is a member of the State Board of Land Commissioners.

10. J.D. WILLIAMS is the AUDITOR of the State of Idaho and as such is a member of the State Board of Land Commissioners.

11. KEITH HIGGINSON is the Director of the DEPARTMENT OF WATER RESOURCES.

12. STATE BOARD OF LAND COMMISSIONERS is a creation of the Idaho Constitution charged under Idaho law with effectuating its trustee ownership of the beds and banks of navigable bodies of water subject to the STATE OF IDAHO's jurisdiction.

13. DEPARTMENT OF WATER RESOURCES is a creation of the Idaho Constitution charged under Idaho Law with effectuating the ownership and issuance of licenses authorizing the use of waters under the jurisdiction of the STATE OF IDAHO.

14. The UNITED STATES OF AMERICA has an interest in this proceeding solely as trustee for the COEUR

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D'ALENE TRIBE OF IDAHO of the beds, banks and waters at issue herein.

IV. CLASS

15. This action is properly maintained as a class action under FRCP 23, the class consisting of all present and future enrolled members of the COEUR D'ALENE TRIBE OF IDAHO.

V. FACTS

16. The indigenous people currently known as the COEUR D'ALENE TRIBE OF IDAHO exercised exclusive dominion, control and occupancy [sic] the area from the Idaho/Montana line along the St. Joe/Clearwater divide, west to Steptoe Butte in the current State of Washington, north to Antoine Plant's Ferry in the Spokane Valley, then to Lake Pend Orielle, then south along the Idaho/Montana border to the point of beginning. The COEUR D'ALENE TRIBE therefore held aboriginal or Indian title to all lands, beds, banks and waters in this area, entitling them to the right of exclusive use and occupancy thereof. 4 ICC 1.

17. In 1846 the United States of America purchased from Great Britain the Oregon Territory which included this territory. In that purchase agreement, the United States specifically recognized Indian rights and title. 95 Stat. 869.

18. In 1863 the United States Congress established the Territory of Idaho but specifically exempted all Indian territory from the Territory of Idaho. 12 Stat. 808, ch. 117.

19. In 1873 President U.S. Grant established the Coeur d'Alene Reservation by Executive Order as follows:

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians, in said Territory, viz:

Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks, directly south of a point on said last-named creek, 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission, on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in, or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington, as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence south along said dividing line to the top of the dividing ridge between Pine and Latah (or Hangman's) Creek; thence along the top of the said ridge to the place of beginning.

Executive Mansion, November 8, 1873.

Since a portion of the boundary description was the "... center of the channel of said Spokane River ..." the Executive Order was an explicit withdrawal and reservation of the beds and banks of navigable water courses

and all waters for the exclusive benefit of Coeur d'Alene Tribe.

20. In 1887 an Agreement was entered into between the Coeur d'Alene Tribe and the United States in which the Coeur d'Alene Tribe ceded lands outside the 1873 Reservation. The Agreement further stated this area within the Reservation was to be held for the Coeur d'Alenes and other Indians and used by others only with the consent of the Indians on the Reservation. 26 Stat. 1026 § 19.

21. In 1889 another Agreement was entered into between the Coeur d'Alene Tribe and the United States in which the Coeur d'Alene Tribe agreed to cede an additional territory to the United States but did not cede any of the beds, banks or waters at issue herein. 26 Stat. 1026 § 20.

22. In 1890 the United States Congress admitted the State of Idaho into the United States by enacting the Idaho Admission Bill which accepted, ratified and confirmed that the Idaho Constitution that disclaimed all right and title to lands owned or held by any Indian Tribes. 26 Stat. 215, ch. 656.

23. The Coeur d'Alene Tribe's Indian or aboriginal title to the beds, banks and waters at issue herein has never been ceded by the Coeur d'Alene Tribe, otherwise extinguished by the United States, or transferred by operation of law out of tribal ownership.

24. The Coeur d'Alene Tribe's beneficial interest, subject to the trusteeship of the United States, in the beds, banks and waters at issue herein has never been ceded by the



Coeur d'Alene Tribe, or otherwise extinguished or conveyed by the United States or transferred by operation of law out of tribal ownership.

25. The value of the beds, banks and waters at issue herein and directly in dispute or controversy exceeds \$10,000.

26. By this Complaint the Coeur d'Alene Tribe of Idaho does not assert any claims of interest adverse to the United State's right of navigable servitude or adverse to any other statutorily created interest the United States has in the beds, banks and waters at issue herein. The Coeur d'Alene Tribe is unaware of any other interest claimed by the United States in the beds, banks and waters at issue herein other than as trustee for the Coeur d'Alene Tribe and this Complaint is served upon the United States solely in that regard.

27. Notwithstanding any other provision of this Complaint to the contrary, the Coeur d'Alene Tribe of Idaho does not assert in this Complaint any claim of interest adverse to that granted by Congress to Fredrick Post in Section 22 of the Act of Congress ratifying the 1887 and 1889 Agreements. 26 Stat. 1026.

28. Defendants' statutes, ordinances, regulations, actions and usages unlawfully purport to regulate, authorize, use or otherwise affect beds and banks and waters at issue herein in violation of the plaintiffs' rights of ownership, including the right of exclusive use and occupancy and the right of quiet enjoyment.

29. The plaintiffs' rights involved in this action are well defined. They are enforceable civil rights of the individual and class plaintiffs secured by the laws of the United States, of which plaintiffs and the class have been unlawfully deprived by defendants under color of state statute, ordinance, regulation, custom and usage in violation of 42 USC 1983.

30. Plaintiffs have no other adequate remedy at law.

31. Plaintiffs are entitled to costs and attorney fees pursuant to 42 USC 1988, IC 12-117 and other theories.

#### COUNT 1

##### ABORIGINAL OR INDIAN TITLE TO BEDS, BANKS AND WATERS

32. All other paragraphs are incorporated herein.

33. Plaintiffs are entitled to an order quieting the Coeur d'Alene Tribe's title to the beds and banks of all navigable waters courses and all waters within the 1873 Coeur d'Alene Reservation boundaries.

34. Plaintiffs are entitled to a declaratory judgment pursuant to 28 USC 2201:

- a) declaring that they have the exclusive use and occupancy of all beds and banks of all navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundaries;
- b) declaring invalid all State laws which purport to authorize or regulate any use of the beds and banks of all navigable water

courses and all waters within the 1873 Coeur d'Alene Reservation boundaries; and

- c) declaring invalid the water right in Lake Coeur d'Alene issued pursuant to IC 67-4304.

35. Plaintiffs are entitled to permanent injunction enjoining defendants and their successors in office from taking any actions or enforcing any State statutes, ordinances, regulations, customs or usages which cause the plaintiffs to be deprived of their rights and privileges of exclusive use and occupancy to all beds and banks of all navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundaries.

## COUNT 2

### RESERVATION OF TITLE TO BEDS, BANKS AND WATERS

36. All other paragraphs are incorporated herein.

37. Plaintiffs are entitled to an order quieting the Coeur d'Alene Tribe's title in its beneficial interests in the beds and banks of all navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundaries subject to the trusteeship of the United States.

38. Plaintiffs are entitled to a declaratory judgment pursuant to 28 USC 2201:

- a) declaring that they have the exclusive use and occupancy of all beds and banks of all navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundaries;

- b) declaring invalid all State laws which purport to authorize or regulate any use of the beds and banks of all navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundaries; and

- c) declaring invalid the water right in Lake Coeur d'Alene issued pursuant to IC 67-4304.

39. Plaintiffs are entitled to a permanent injunction enjoining defendants and their successors in office from taking any actions or enforcing any State statutes, ordinances, regulations, customs or usages which caused the plaintiff to be deprived of their rights and privileges of exclusive use and occupancy to all beds and banks of all navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundaries.

WHEREFORE, the plaintiffs pray that the Court

- 1) Quiet the Coeur d'Alene Tribe of Idaho's aboriginal or Indian title to the beds and banks of navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundary;
- 2) Quiet the Coeur d'Alene Tribe of Idaho's beneficial interest in title, subject to the trusteeship of the United States to the beds and banks of navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundary;
- 3) Declare that the plaintiffs are entitled to the exclusive use and occupancy and the right to quiet enjoyment of the beds and banks of navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundary;
- 4) Declare invalid all Idaho statutes, ordinances, regulations, customs or usages which purport to regulate,



authorize use or affect in any way the beds and banks of navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundary;

- 5) Declare invalid the water right issued pursuant to IC 67-4304;
- 6) Preliminarily and permanently enjoin defendants from regulating, permitting or taking any action in violation of the plaintiffs' rights of exclusive use and occupancy, quiet enjoyment and other ownership interest in the beds and banks of navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundary;
- 7) Award plaintiffs their costs and attorney fees;
- 8) Grant such other relief as is deemed appropriate.

DATED this 14th day of October, 1991.

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Attorneys for Plaintiffs

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HOWARD FUNKE

By /s/ Raymond C. Givens  
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### Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

IN THE MATTER OF THE	)	
OWNERSHIP OF THE BEDS AND	)	
BANKS AND ALL WATERS OF	)	
ALL NAVIGABLE WATER	)	CASE NO. CIV
COURSES WITHIN THE 1873	)	91-0437-N-HLR
COEUR D'ALENE RESERVATION	)	
BOUNDARY	)	
<hr/>		
COEUR D'ALENE TRIBE OF	)	MOTION TO
IDAHO, in its own right and as	)	DISMISS
the beneficially interested party	)	
subject to the trusteeship of the	)	(13) QUIET
UNITED STATES OF AMERICA;	)	TITLE
ERNEST L. STENSGAR,	)	(9) CIVIL
LAWRENCE ARIPA, MARGARET	)	RIGHTS
JOSE', DOMNICK CURLEY, AL	)	
GARRICK, NORMA PEONE and	)	
HENRY SIJOHN, individually, in	)	(Filed
in [sic] their official capacity and	)	Nov. 13, 1991)
on behalf of all enrolled members	)	
of the COEUR D'ALENE TRIBE	)	
OF IDAHO,	)	
	)	
Plaintiffs,	)	

vs.

STATE OF IDAHO; CECIL D. ANDRUS, GOVERNOR; PETE CENARRUSA, SECRETARY OF STATE; LARRY ECHOHAWK, ATTORNEY GENERAL; J.D. WILLIAMS, AUDITOR; JERRY EVANS, SUPERINTENDENT OF PUBLIC INSTRUCTION; KEITH HIGGINSON, DIRECTOR, DEPT. OF WATER RESOURCES; each individually and in his official capacity; IDAHO STATE BOARD OF LAND COMMISSIONERS; and IDAHO STATE DEPARTMENT OF WATER RESOURCES;

Defendants.

Defendants, State of Idaho; the State Board of Land Commissioners; the Idaho Department of Water Resources; Cecil D. Andrus, Governor; Pete Cenarrusa, Secretary of State; Larry EchoHawk, Attorney General; J.D. Williams, State Auditor; Jerry Evans, Superintendent of Public Instruction; and Keith Higginson, Director of the Idaho Department of Water Resources, by and through their counsel of record, move this Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to:

1. Dismiss the Plaintiffs' actions for quiet title, declaratory judgment, and injunctive relief against the State of Idaho; the State Board of Land Commissioners; the Idaho Department of Water Resources; Cecil D. Andrus, Governor; Pete Cenarrusa, Secretary of State; Larry EchoHawk, Attorney General; J.D. Williams,

State Auditor; Jerry Evans, Superintendent of Public Instruction; and Keith Higginson, Director of the Idaho Department of Water Resources, as barred by the jurisdictional limitations of the Eleventh Amendment of the United States Constitution.

2. Dismiss the Plaintiffs' actions for quiet title, declaratory judgment; and injunctive relief against Cecil D. Andrus, Governor; Pete Cenarrusa, Secretary of State; Larry EchoHawk, Attorney General; J.D. Williams, State Auditor; Jerry Evans, Superintendent of Public Instruction; and Keith Higginson, Director of the Idaho Department of Water Resources, for failure to state a claim upon which relief can be granted.
3. Dismiss all civil rights actions brought by the Plaintiffs under 42 U.S.C. § 1983 against the State of Idaho; the State Board of Land Commissioners; the Idaho Department of Water Resources; Cecil D. Andrus, Governor; Pete Cenarrusa, Secretary of State; Larry EchoHawk, Attorney General; J.D. Williams, State Auditor; Jerry Evans, Superintendent of Public Instruction; and Keith Higginson, Director of the Idaho Department of Water Resources, as barred by the jurisdictional limitations of the Eleventh Amendment of the United States Constitution and for failure to state a claim upon which relief can be granted.

Respectfully submitted this 13th day of November, 1991.

LARRY ECHOHAWK  
Attorney General

/s/ Clive J. Strong  
CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division



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/s/ Steven W. Strack  
STEVEN W. STRACK  
Deputy Attorney General  
Attorneys for Defendants

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App. 19

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

IN THE MATTER OF THE )  
OWNERSHIP OF THE BEDS AND )  
BANKS AND ALL WATERS OF )  
ALL NAVIGABLE WATER )  
COURSES WITHIN THE 1873 )  
COEUR D'ALENE RESERVATION )  
BOUNDARY. )

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COEUR D'ALENE TRIBE OF )  
IDAHO, in its own right and as )  
the beneficially interested party )  
subject to the trusteeship of the )  
UNITED STATES OF AMERICA; )  
ERNEST L. STENSGAR, )  
LAWRENCE ARIPIA, MARGARET )  
JOSE', DOMINICK CURLEY, AL )  
GARRICK, NORMA PEONE and )  
HENRY SIJOHN, individually, in )  
their official capacity and on )  
behalf of all enrolled members of )  
the COEUR D'ALENE TRIBE OF )  
IDAHO, )

Plaintiffs - Appellants

vs.

STATE OF IDAHO; CECIL D. )  
ANDRUS, GOVERNOR; PETE )  
CENARRUSA, SECRETARY OF )  
STATE; LARRY ECHOHAWK, )  
ATTORNEY GENERAL; J.D. )  
WILLIAMS, AUDITOR; JERRY )  
EVANS, SUPERINTENDENT OF )  
PUBLIC INSTRUCTION; KEITH )  
HIGGINSON, DIRECTOR, DEPT. )  
OF WATER RESOURCES; each )  
individually and in his official )  
capacity; IDAHO STATE BOARD )

U.S. COURT  
OF APPEALS  
DOCKET NO.  
92-36703

LOWER COURT  
DOCKET  
NO.  
CV-91-437-HLR  
District of  
Idaho (Boise)

NOTICE OF  
FILINGS

(Filed  
Oct. 24, 1994)

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OF LAND COMMISSIONERS; and )  
IDAHO STATE DEPARTMENT OF )  
WATER RESOURCES )  
Defendants - Appellees )  
\_\_\_\_\_)

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF IDAHO  
HONORABLE HAROLD RYAN PRESIDING

RAYMOND C. GIVENS  
SHANNON D. WORK  
GIVENS, FUNKE & WORK  
424 Sherman, Suite 308  
P.O. Box 969  
Coeur d'Alene, ID 83816-0969  
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Comes now Coeur d'Alene Tribe to give notice to the  
Court of the filing of the below listed documents in the  
new action of *United States v Idaho*, U.S.D.Ct. Id.  
#CIV-94-0328-EJL.

*United States v. Idaho* currently involves many, but not  
all of the same issues that the District Court ruled it did  
not have jurisdiction to consider in this case. The Tribe's  
proposed Complaint in Intervention would raise all  
issues that the District Court felt it did not have jurisdic-  
tion to consider against Defendant, State of Idaho.

The attached documents which have been filed or  
proposed are:

1. United States' Complaint.
2. State of Idaho's Answer & Counterclaim.

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3. United States' Answer to Counterclaim.
4. Coeur d'Alene Tribe's Motion to Intervene
5. Coeur d'Alene Tribe's Proposed Complaint &  
Answer to Counterclaim in Intervention.

DATED this 20th day of October, 1994.

Respectfully submitted,  
GIVENS, FUNKE & WORK  
/s/ Raymond C. Givens  
RAYMOND C. GIVENS



LOIS J. SCHIFFER  
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Environment and Natural Resources Division  
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Attorneys for Plaintiff,  
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF IDAHO

*In re* suit to quiet title to that  
portion of the bed and banks of  
Coeur d'Alene Lake and St. Joe River  
lying within the exterior boundaries  
of the 1873 Coeur d'Alene Reservation

UNITED STATES OF AMERICA,  
Plaintiff,  
-vs-  
STATE OF IDAHO,  
Defendant.

CASE NO. \_\_\_\_\_  
CIV  
93-0328-N-EJL

COMPLAINT TO QUIET TITLE

(Filed July 21, 1994)

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its attorney, Hank Meshorer, United States Department of Justice, acting under the authority of the Attorney General of the United States, and, at the request of the Department of the Interior, herewith files its complaint, alleging and stating as follows:

I. PRELIMINARY STATEMENT

1. This is a civil action by the United States to quiet title to that portion of the bed and banks of the Coeur d'Alene Lake (hereinafter "Lake"), and the St. Joe River lying within the exterior boundaries of the 1873 Coeur d'Alene Indian Reservation for the use and benefit of the Coeur d'Alene Tribe (hereinafter "Tribe"). The complaint also seeks a declaration that the defendant has no rights or interest in said bed and banks, as well as an injunction barring the defendant from asserting any right or title to said bed and banks.

II. JURISDICTION AND VENUE

2. The United States is plaintiff in this action. This court has jurisdiction under 28 U.S.C. §§ 1345, 1331 and 2202-2202.

3. The land at issue is located in Kootenai and Benewah Counties, Idaho. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b) and Local Rules of the United States

District Court for the District of Idaho, Rule 3.2, Northern Calendar.

### III. PARTIES

4. The plaintiff, UNITED STATES OF AMERICA, brings this action in its own capacity and as trustee for the benefit of the Coeur d'Alene Tribe of Idaho and its individual Members.

5. The defendant, STATE OF IDAHO, is one of the 50 states within whose exterior boundary is located the Coeur d'Alene Indian Reservation and the beds and banks at issue herein.

### IV. GENERAL ALLEGATIONS

6. By virtue of the Treaty with Great Britain in 1846, 9 Stat. 869, the United States purchased from Great Britain the Oregon Territory, which included the beds and banks at issue herein.

7. In 1863 the United States Congress established the Territory of Idaho, but specifically exempted all Indian territory from the Territory of Idaho. 12 Stat. 808, ch. 117.

8. On November 8, 1873, by Executive Order, the Coeur d'Alene Indian Reservation was established within the aboriginal homeland of the Coeur d'Alene Tribe as follows:

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians, in said Territory, viz: Beginning at the

point on the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks, directly south of a point on said last-named creek, 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission, on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in, or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington, as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence south along said dividing line to the top of the dividing ridge between Pine and Latah (or Hangman's) Creek; thence along the top of said ridge to the place of beginning.

All of Coeur d'Alene Lake and the St. Joe River were thus included within the 1873 Reservation except for small portions of the Lake where the northern shoreline meandered across the direct line from the Coeur d'Alene Mission to the source of the Spokane River. See attached map (Exhibit 1), which by this reference is incorporated as if set forth verbatim herein.

9. In 1889, the Coeur d'Alene Tribe ceded to the United States the approximate northern one-third of the 1873 Reservation, including approximately the northern two-thirds of the Lake. The 1889 cession agreement described the new reservation's boundaries as follows:



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Beginning at the northeast corner of the said reservation, thence running along the north boundary line north 67° 29' west to the head of the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line twelve miles; thence southerly along west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary of the said reservation; thence northerly along the said east boundary line to the place of beginning.

26 Stat. 1030 (1891). See attached map (Exhibit 1).

10. In 1894, the Tribe ceded to the United States a one-mile strip of land known as the "Harrison Strip," as follows:

Beginning at a point on the north line of the reservation, on the east bank of the mouth of the Coeur d'Alene River, and running due south one mile, thence due east parallel with the north line to the east boundary line, thence north on the east boundary line to the northeast corner of the reservation, thence west on the north boundary line to the point of beginning.

Act of August 15, 1894, ch. 290, 28 Stat. 322. Such cession slightly altered the above-noted 1889 Reservation boundary across the lake. See attached map (Exhibit 1).

11. In 1908, the United States withdrew from allotment and settlement and reserved certain lands approximate to

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the southern extreme of the Lake and now known as "Heyburn State Park," as follows:

Sections one, two and twelve, township forty-six north range four west, Boise meridian; sections thirty-five and thirty-six, township forty-seven north, range four west, Boise meridian; all of those portions of sections two, three, four, five, six, seven, eight, nine, ten, and eleven, township forty-six north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township; all of those portions of sections thirty-one and thirty-two, township forty-seven north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township.

35 Stat. 79. See attached map (Exhibit 1).

12. By virtue of the above-described 1889 and 1894 cession agreements and the 1908 withdrawal and reservation, however, the Coeur d'Alene Tribe did not at any time cede to the United States any of those portions of the bed and banks of the approximate southern one-third of the Lake or of the St. Joe River still remaining within the Coeur d'Alene 1873 Reservation. Such remaining bed and banks are still held in trust by the United States for the benefit of the Coeur d'Alene Indian Tribe.

13. The Coeur d'Alene Tribe and its members are now in possession of those portions of the said bed and banks in question located within the Coeur d'Alene Indian Reservation, which include the bed and banks of the approximate southern one-third of the Lake as well as certain portions of the St. Joe River.

14. By virtue of the Idaho Admission Bill the defendant was admitted to the Union in 1890. Idaho Admission Bill § 1 (1890). 26 Stat. 215. Such Admission Bill accepted and ratified the fact that Article XXI, Section 19 of Idaho's Constitution disclaimed all right and title to lands owned or held by any Indians or Indian tribes located within its borders.

15. The defendant is claiming some right, title or interest to all of the beds and banks of the navigable waterways within its state, including the subject bed and banks, and is also asserting the right to possession of those lands. See Idaho Code § 58-1304 (formerly Idaho Code § 58-142). The claims of the defendant are null and void and of no effect.

16. The construction of docks, piers, floats, pilings, breakwaters, boat ramps and other such aids to navigation upon the beds of navigable lakes is permitted in Idaho only upon the payment of fees to the defendant. See Idaho Code, § 58-1307 (formerly Idaho Code § 58-148).

17. Pursuant to Idaho Code, § 58-1306 (formerly Idaho Code § 58-147) the defendant, without the permission or consent of the United States or the Tribe, has approved and issued permits for the construction of docks, piers, floats, pilings, breakwaters, boat ramps and other such aids to navigation within the southern one-third of Coeur d'Alene Lake.

18. The plaintiff, on behalf of the Coeur d'Alene Tribe, is entitled to a judgment: (1) quieting its title to the bed and banks of the approximate southern one-third of Coeur d'Alene Lake as well as those portions of the bed and

banks of the St. Joe River located within the Coeur d'Alene Reservation, to be held for the use and benefit of the Coeur d'Alene Tribe and its members; (2) upholding the right of possession of the Coeur d'Alene Tribe and its members to those lands, and (3) declaring that the defendants have no right to title or interest in such lands and no right of possession thereof.

19. The plaintiff and the Coeur d'Alene Tribe will continue to suffer irreparable injury unless judgment is entered by this court upholding their title and right to possession of the bed and banks of the approximate southern one-third of Coeur d'Alene Lake as well as those portions of the bed and banks of the St. Joe River situate within the Coeur d'Alene Indian Reservation. The Plaintiff has no other adequate remedy at law.

WHEREFORE, the plaintiff, on behalf of the Coeur d'Alene Tribe prays that this court enter judgment and decree as follows:

(1) Quieting the title of the United States to the bed and banks of the approximate southern one-third of Coeur d'Alene Lake as well as those portions of the bed and banks of the St. Joe River located within the 1873 Coeur d'Alene Indian Reservation for the use and benefit of the Coeur d'Alene Tribe;

(2) Declaring that the plaintiff, as trustee and for the benefit and use of the tribe, are entitled to the exclusive use, occupancy and right to the quiet enjoyment of the beds and banks of the approximate southern one-third of Coeur d'Alene Lake as well as those portions of the beds and banks of the St. Joe River located within the 1873 Coeur d'Alene Indian Reservation.



(3) Declaring that the defendant has no right to title or otherwise interest in or to the approximate southern one-third of Coeur d'Alene Lake as well as those portions of the bed and banks of the St. Joe River located within the 1873 Coeur d'Alene Indian Reservation.

(4) Preliminarily and permanently enjoining the defendant from asserting any right, title or otherwise interest in or to the beds and banks of the approximate southern one-third of Coeur d'Alene Lake as well as those portions of the [sic] and banks of the St. Joe River located within the 1873 Coeur d'Alene Indian Reservation or otherwise interfering in any way with the exclusive possession, use and occupancy of such lands by the United States, the Coeur d'Alene Tribe and its members;

(5) For the costs of this action and for such other relief that the court may deem [sic] appropriate.

Done this 19th day of July, 1994.

Respectfully submitted,

LOIS SCHIFFER  
ACTING ASSISTANT ATTORNEY  
GENERAL  
UNITED STATES DEPARTMENT  
OF JUSTICE  
ENVIRONMENT AND NATURAL  
RESOURCES DIVISION

BETTY RICHARDSON  
UNITED STATES ATTORNEY  
DISTRICT OF IDAHO

/s/ Hank Meshorer  
HAND MESHORER  
CHIEF, INDIAN RESOURCES  
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**Map 27:** This map shows Coeur d'Alene Reservation boundary changes that affected ownership of lake and river beds. Map from USGS 1:250,000 Spokane quad.



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ATTORNEYS FOR STATE OF IDAHO

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF IDAHO

In re suit to quiet title to that	)	
portion of the bed and banks of	)	
Coeur d'Alene Lake and St. Joe	)	Case No. CIV
River lying within the exterior	)	94-0328-N-EJL
boundaries of the 1873 Coeur	)	
d'Alene Reservation	)	ANSWER AND
	)	COUNTERCLAIM
	)	(Filed
UNITED STATES OF AMERICA,	)	Aug. 9, 1994)
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Defendant.	)	
	)	

Defendant, State of Idaho, in answer to the plaintiff's Complaint to Quiet Title, admits, denies, and alleges as follows:

1.1 Paragraph 1 characterizes the Complaint and therefore contains legal conclusions to which no response is required. To the extent that a response is necessary to such allegations, the Defendant denies that the United States seeks "to quiet title to that portion of Coeur d'Alene Lake . . . and the St. Joe River within the exterior boundaries of the 1873 Coeur d'Alene Indian Reservation," since that statement does not accurately characterize the relief sought by the United States, and further denies all other allegations in paragraph 1.

1.2 Defendant admits the allegations in paragraph 2.

1.3 Defendant admits the allegations in paragraph 3, but notes that the Local Rule addressing venue has recently been amended so that it is denominated as Rule 3.1, not Rule 3.2.

1.4 Defendant admits the allegations in paragraph 4.

1.5 Defendant admits the allegations in paragraph 5.

1.6 Defendant admits the allegations in paragraph 6.

1.7 The allegations contained in paragraph 7 constitute arguments of matters of law to which no response is required. Insofar as the allegations may be construed otherwise, Defendant admits that in 1863 Congress established the Territory of Idaho, but asserts that the Act

establishing the Territory speaks for itself and therefore denies Plaintiff's characterization of the Act.

1.8 The allegations contained in paragraph 8 constitute arguments of matters of law to which no response is required. Insofar as the allegations may be construed otherwise, Defendant admits that the Executive Order was issued on November 8, 1873, but asserts that the Order speaks for itself and therefore denies Plaintiff's characterization of the Order.

1.9 In regard to the allegations in paragraph 9, Defendant admits that the Coeur d'Alene Tribe in 1889 entered into an agreement with the United States whereby the Tribe ceded any and all interests it had in the northern third of the 1873 Reservation, including the northern two-thirds of Lake Coeur d'Alene, and admits the boundaries of the cession as described, but denies any inference that the Coeur d'Alene Tribe had any ownership, title or right of exclusive possession in the beds and banks of Lake Coeur d'Alene prior to the cession.

1.10 Defendant admits the allegations in paragraph 10.

1.11 Defendant admits the allegations in paragraph 11 that the United States in 1908 withdrew and reserved certain lands now known as Heyburn State Park, admits the provided description of the boundaries of Heyburn State Park, but asserts that the Act withdrawing the lands speaks for itself and therefore denies Plaintiff's characterization of the Act.

1.12 Defendant denies the allegations in paragraph 12.



1.13 Defendant denies the allegations in paragraph 13.

1.14 The allegations contained in paragraph 14 constitute arguments of matters of law to which no response is required. Insofar as the allegations may be construed otherwise, Defendant admits that in 1890 Idaho was admitted to the Union by virtue of the Idaho Admission Bill, admits that the Admission Bill accepted and ratified the Idaho Constitution, but asserts that the Admission Bill and the Idaho Constitution speak for themselves and therefore denies Plaintiff's characterizations of the Admission Bill and the Idaho Constitution.

1.15 Defendant admits that it claims right, title and interest in, and the right of possession of, the beds and banks of all navigable waters within the state of Idaho, including the subject beds and banks, and denies all other allegations in paragraph 15.

1.16 Defendant admits the allegations in paragraph 16.

1.17 Defendant admits that it has approved and issued permits for the construction of docks, piers, floats, pilings, breakwaters, boat ramps and other aids to navigation in the southern third of Lake Coeur d'Alene, and denies all other allegations in paragraph 17.

1.18 Defendant denies the allegations in paragraph 18.

1.19 Defendant denies the allegations in paragraph 19.

1.20 Defendant has incurred costs, expenses, and attorney fees in defending against this action.

### AFFIRMATIVE DEFENSES

The Defendant alleges the following affirmative defenses:

#### First Affirmative Defense

2.1 The Complaint to Quiet Title fails to state a cause of action or claim upon which relief can be granted.

#### Second Affirmative Defense

3.1 Any reservation of the beds and banks of Lake Coeur d'Alene and the St. Joe River by the President of the United States that purported to defeat the State of Idaho's equal footing entitlement to such beds and banks was unconstitutional and therefore null and void.

#### Third Affirmative Defense

4.1 By virtue of the Treaty with Great Britain in 1846, 9 Stat. 869, the United States purchased from Great Britain the Oregon Territory, which included the beds and banks claimed by the United States in this action.

4.2 After the United States acquired from Great Britain the beds and banks claimed by the United States in this action, the United States held title to those beds and banks in trust for the future state of Idaho.

4.3 Prior to July 3, 1890, there was no authorized federal reservation of the beds and banks claimed by the United States in this action.

4.4 Prior to July 3, 1890, there was no authorized federal conveyance, to the Coeur d'Alene Tribe or any other party, of the beds and banks claimed by the United States in this action.

4.5 On July 3, 1890, the United States Congress admitted the State of Idaho into the Union on an equal footing with every other state. Under the terms of the United States Constitution, the admission of Idaho into the Union vested the State of Idaho with title to the beds and banks claimed by the United States in this action.

4.6 Nothing in the Idaho Constitution or Idaho Admission Bill disclaims or divests the State of Idaho's sovereign title to the beds and banks claimed by the United States in this action.

4.7 The State of Idaho has sovereign title to the beds and banks claimed by the United States in this action.

#### Fourth Affirmative Defense

5.1 The Defendant reasserts the allegations in paragraphs 4.1 through 4.7 of the Third Affirmative Defense set forth in this Answer and incorporates them in this Fourth Affirmative Defense as though fully set forth herein.

5.2 The Defendant asserts the following as an alternative defense or claim: even if the State of Idaho's equal footing title did not extend to the beds and banks of Lake Coeur d'Alene and the St. Joe River as a result of its admission into the Union on July 3, 1890, the State of Idaho has title to all lands within Heyburn State Park as a result of the following federal actions:

5.2.1 In 1908, Congress authorized the Secretary of the Interior to convey the following lands to the State of Idaho to be maintained as a public park:

Sections one, two and twelve, township forty-six north range four west, Boise meridian; sections thirty-five and thirty-six, township forty-seven north, range four west, Boise meridian; all of those portions of sections two, three, four, five, six, seven, eight, nine, ten, and eleven, township forty-six north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township; all of those portions of sections thirty-one and thirty-two, township forty-seven north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township.

35 Stat. 79.

5.2.2 In 1911, the United States conveyed to the State of Idaho by Patent No. 213295 exclusive possession of all lands within the boundaries described in paragraph 5.2.1, with the proviso that the lands were to revert to the United States if the State ceased to use the lands as a public park.

5.3 The area described by the boundaries of Patent No. 213295 includes portions of the beds and banks of the southern third of Lake Coeur d'Alene and the associated navigable waters commonly deemed to be part of Lake Coeur d'Alene, including but not limited to Lake Chatcolet.



5.4 On December 30, 1976, the State of Idaho filed in this Court a complaint seeking a declaratory judgment that it remained in compliance with the terms of Patent No. 213295. *State of Idaho v. Kleppe*, CIV 1-76-231.

5.5 On September 7, 1977, the United States filed in this Court a complaint seeking to quiet title to the lands within the boundaries described in Patent No. 213295, alleging that the State had violated the terms of the patent and therefore forfeited its title. *United States v. State of Idaho, et al.*, CIV 77-2058.

5.6 On cross-motions for summary judgment, this Court held that Patent No. 213295 conveyed to the State of Idaho a fee simple title subject to a condition subsequent, that the condition subsequent had not been violated, and therefore the State of Idaho was entitled to summary judgment.

5.7 Under the doctrine of *res judicata*, the United States remains bound by this Court's judgment affirming the State of Idaho's fee title to the lands conveyed by Patent No. 213295.

#### COUNTERCLAIMS

Defendant-Counterclaimant State of Idaho, by and through counsel, hereby submits its Counterclaim in this matter seeking to quiet its sovereign title to the beds and banks of the navigable waters claimed by the Plaintiff-Counterdefendant.

Defendant-Counterclaimant counterclaims and alleges as follows:

#### First Counterclaim

6.1 The Counterclaimant is the State of Idaho, a sovereign state of the United States.

6.2 The Counterdefendant is the United States of America.

6.3 The Court has jurisdiction to hear this counterclaim under 28 U.S.C. §§ 1331, 1345, 1346, 2409a, and Rule 13 of the Federal Rules of Civil Procedure.

6.4 Venue is properly in this Court pursuant to 28 U.S.C. § 1391(b) and Local Rule 21.

6.5 The Counterclaimant reasserts the allegations in paragraphs 4.1 through 4.7 of the Third Affirmative Defense set forth in this Answer and incorporates them in this Counterclaim as though fully set forth herein.

6.6 The Counterclaimant is entitled to a judgment (1) quieting its title to the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River Located within the Coeur d'Alene Reservation; (2) upholding the Counterclaimant's right of possession to those lands; and (3) declaring that the Counterdefendant has no estate, right, title or interest in such lands and no right of possession thereof.

#### Second Counterclaim

7.1 The Counterclaimant reasserts the allegations in paragraphs 6.1 through 6.4 of the First Counterclaim set forth in this Answer and incorporates them in this Second Counterclaim as though fully set forth herein.

7.2 The Counterclaimant reasserts the allegations in paragraphs 4.1 through 4.7 of the Third Affirmative Defense set forth in this Answer and incorporates them in this Second Counterclaim as though fully set forth herein.

7.3 The Counterclaimant reasserts the allegations in paragraphs 5.1 through 5.7 of the Fourth Affirmative Defense set forth in this Answer and incorporates them in this Second Counterclaim as though fully set forth herein.

7.4 The Counterclaimant is entitled to a judgment (1) quieting its title to the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River located within Heyburn State Park; (2) upholding the Counterclaimant's right of possession to those lands; and (3) declaring that the Counterdefendant has no estate, right, title or interest in such lands and no right of possession thereof.

#### PRAYER FOR RELIEF

WHEREFORE, the Defendant-Counterclaimant respectfully prays that this Court enter a judgment and decree as follows:

A. Dismissing the Complaint to Quiet Title with prejudice and declaring that Plaintiff take nothing by its complaint;

B. Quieting the State of Idaho's sovereign title to those portions of Lake Coeur d'Alene and the St. Joe River within the present boundaries of the Coeur d'Alene Reservation and Heyburn State Park;

C. Declaring that the State of Idaho holds sovereign title to, and is entitled to the exclusive use and occupancy

of, the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River within the present boundaries of the Coeur d'Alene Reservation and Heyburn State Park;

D. Declaring that the Plaintiff has no estate, right, title or other interest in or to the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River within the present boundaries of the Coeur d'Alene Reservation and Heyburn State Park;

E. Permanently enjoining the Plaintiff from asserting any estate, right, title or other interest in or to the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River within the present boundaries of the Coeur d'Alene Reservation and Heyburn State Park; or otherwise interfering in any way with the State of Idaho's exclusive possession, use, and occupancy of such lands.

F. Awarding Defendant its costs and attorney fees in this proceeding to the extent that such are allowed by the terms of 28 U.S.C. § 2412 and other applicable laws.

G. Granting Defendant whatever further and additional relief the Court deems fitting and just.

DATED this 9th day of August, 1994.

LARRY ECHOHAWK  
Attorney General

By: /s/ Steven W. Strack  
CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources  
Division



/s/ Steven W. Strack  
**STEVEN W. STRACK**  
 Deputy Attorney General  
 Natural Resources Division

---

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Attorneys for Plaintiff and Counter-Defendant  
**UNITED STATES OF AMERICA**

**UNITED STATES DISTRICT COURT FOR THE  
 DISTRICT OF IDAHO**

*In re* suit to quiet title to that )  
 portion of the bed and banks of )  
 Coeur d'Alene Lake and St. Joe )  
 River lying within the exterior )  
 boundaries of the 1873 Coeur )  
 d'Alene Reservation )

---

**UNITED STATES OF AMERICA,** )  
 Plaintiff, )  
 -vs- )  
**STATE OF IDAHO,** )  
 Defendant. )

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CASE NO.  
 CIV 94-0328-N-ELJ  
**ANSWER TO  
 COUNTERCLAIM**  
 (Filed Oct. 11, 1994)

STATE OF IDAHO,	)
Counter-claimant,	)
UNITED STATES OF AMERICA,	)
Counter-defendant	)

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### ANSWER TO COUNTERCLAIM

COMES NOW the Counter-defendant, UNITED STATES OF AMERICA, by and through its attorney, Hank Meshorer, Chief, Indian Resources Section, United States Department of Justice, and, using the paragraph delineation of the Counterclaim, herewith files its ANSWER TO COUNTERCLAIM as follows:

#### First Counterclaim

6.1. Counter-defendant admits the allegations contained in paragraph 6.1 of the Counterclaim.

6.2. Counter-defendant admits the allegations contained in paragraph 6.2 of the Counterclaim.

6.3. Paragraph 6.3 of the Counterclaim constitute [sic] arguments and conclusions of law which require no answer. Insofar as the allegations may be construed otherwise and an answer may be required, however, the counter-defendant denies all allegations in said paragraph 6.3.

6.4. Counter-defendant admits the allegations contained in paragraph 6.4 of the Counterclaim.

6.5. Paragraph 6.5, which incorporates by reference the allegations contained in paragraphs 4.1 through 4.7 of

Defendant's Answer, constitute arguments and conclusions of law which require no answer. Insofar as the allegations may be construed otherwise and an answer may be required, counter-defendant only admits the allegations contained in said paragraph 4.1, and denies all other allegations contained in said paragraphs 4.2 through 4.7, and 6.5.

6.6. Paragraph 6.6 of the Counterclaim constitute [sic] arguments and conclusions of law which require no answer. Insofar as the allegations may be construed otherwise and an answer may be required, however, counter-defendant denies all allegations contained in said paragraph 6.6.

#### Second Counterclaim

7.1. Paragraph 7.1 of the Counterclaim incorporates by reference the allegations contained in paragraphs 6.1 through 6.4 of the First Counterclaim. Counter-defendant by this reference herewith likewise incorporates its prior responses to said paragraphs 6.1 through 6.4 as if set forth verbatim herein.

7.2. Paragraph 7.2 of the Counterclaim incorporates by reference the allegations contained in paragraph 6.5 of the Counterclaim, and the counter-defendant herewith incorporates its answer to said paragraph 6.5 as if set forth verbatim herein.

7.3. Paragraph 7.3 of the Counterclaim, which incorporates by reference the allegations contained in paragraphs 5.1 through 5.7 of Defendant's Answer, constitute arguments and conclusions of law which require no



answer. Insofar as the allegations may be construed otherwise and an answer may be required, however, the counter-defendant denies all allegations contained in said paragraphs 5.1 through 5.7, except as follows:

5.2.1. Counter-defendant admits the allegations contained in paragraph 5.2.1 of Defendant's Answer.

5.3. Counter-defendant admits the allegations contained in paragraph 5.3 of Defendant's Answer.

5.4. Counter-defendant admits the allegations contained in paragraph 5.4. of Defendant's Answer.

5.5. Counter-defendant admits the allegations contained in paragraph 5.5 of Defendant's Answer.

8. Counter-defendant denies each and every material allegation of counter-claimants Counterclaim not heretofore expressly admitted.

9. Counter-defendant has incurred costs, expenses, and attorney fees in defending this action.

#### AFFIRMATIVE DEFENSES

As to both the First and Second Counterclaim, the Counter-defendant alleges the following affirmative defenses:

#### FIRST AFFIRMATIVE DEFENSE

The Counterclaims fail to state a claim upon which relief can be granted.

#### SECOND AFFIRMATIVE DEFENSE

The Court lacks the requisite matter jurisdiction over the counterclaims.

WHEREFORE, having fully answered, the Counter-defendant prays that the Counterclaim be dismissed with prejudice and that the counter-claimants take nothing thereby; Counter-defendants have and recover is [sic] costs incurred herein; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted this 7 day of October, 1994.

LOIS SCHIFFER  
ASSISTANT ATTORNEY GENERAL  
UNITED STATES DEPARTMENT OF  
JUSTICE  
ENVIRONMENT AND NATURAL  
RESOURCES DIVISION

BETTY RICHARDSON  
UNITED STATES ATTORNEY  
DISTRICT OF IDAHO

/s/ Hank Meshorer  
HANK MESHORER  
CHIEF, INDIAN RESOURCES  
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 Attorneys for Coeur d'Alene Tribe

UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF IDAHO

In re suit to quiet title to that	)	
portion of the bed and banks of	)	
Coeur d'Alene Lake and St. Joe	)	
River lying within the exterior	)	
boundaries of the 1873 Coeur	)	Case No.
d'Alene Reservation	)	CIV-94-0328-N-EJL
<hr/>		
UNITED STATES OF AMERICA,	)	MOTION TO
Plaintiff,	)	INTERVENE BY
	)	COEUR D'ALENE
	)	TRIBE
vs.	)	
STATE OF IDAHO,	)	(Filed Oct. 21, 1994)
Defendant.	)	
<hr/>		

COMES NOW the Coeur d'Alene Tribe by and through its attorney, RAYMOND C. GIVENS, to move for Leave to Intervene as a plaintiff pursuant to FRCP 24(a)(2) (Intervention As A Matter Of Right) and FRCP 24(b)(2) (Permissive Intervention). Leave is sought to file

the accompanying Complaint and Answer to Counterclaim in Intervention and to fully participate as a Plaintiff and Counterdefendant.

This motion is supported by the accompanying Memorandum which sets out in detail the grounds for intervention, and by the Affidavit of Ernest L. Stensgar.

DATED this 20th day of October, 1994.

/s/ Raymond C. Givens  
 RAYMOND C. GIVENS  
 Attorney for Coeur d'Alene Tribe



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Attorneys for Coeur d'Alene Tribe

UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF IDAHO

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boundaries of the 1873 Coeur	)	
d'Alene Reservation	)	
<hr/>		Case No.
UNITED STATES OF AMERICA,	)	CIV-94-0328-N-EJL
Plaintiff,	)	
Counterdefendant	)	
and	)	
COEUR D'ALENE TRIBE,	)	
Plaintiff in Intervention	)	COMPLAINT &
Counterdefendant in	)	ANSWER TO
Intervention	)	COUNTERCLAIM
	)	IN INTERVENTION
vs.	)	
STATE OF IDAHO,	)	
Defendant,	)	(Received
Counterclaimant.	)	Oct. 21, 1994)
<hr/>		

COMES NOW Plaintiff Intervenor, Coeur d'Alene Tribe (Tribe) through its attorney, RAYMOND C. GIVENS of Givens, Funke & Work, to complain, allege, state and answer the State of Idaho's Counterclaim as follows:

COMPLAINT

I.

Preliminary Statement

1. This is a quiet title, declaratory judgment and injunction action regarding the beds and banks of navigable water courses and waters within the Coeur d'Alene Reservation. The action is brought under theories of both "aboriginal or Indian title" and "recognized title" (granted or reserved).

II.

Jurisdiction & Venue

2. This Court has original jurisdiction for this action under 28 U.S.C. 1345, 1331 and 1346. This Court has supplemental jurisdiction over the Tribe's intervention under 28 U.S.C. 1362 and 1367.

3. Venue is proper under 28 U.S.C. 1391(b). The case is appropriately on the Court's Northern Calendar under Local Rule 3.2.

III.

Parties

4. Coeur d'Alene Tribe (Tribe) is a federally recognized Indian tribe. The Tribe is the aboriginal title holder and

beneficially interested party of the reorganized title of the beds, banks, waters, and water rights at issue.

5. The United States of America is the trustee for the Coeur d'Alene Tribe.

6. The State of Idaho (State) is one of the 50 states within whose exterior boundary is located the Coeur d'Alene Reservation and the beds, banks and waters at issue herein.

#### IV.

##### General Allegations

7. By virtue of the Treaty with Great Britain in 1846, 9 Stat. 869, the United States purchased from Great Britain the Oregon Territory, which included the beds and banks at issue herein subject to the Tribe's right of exclusive use and occupancy under the doctrine of aboriginal Indian title.

8. In 1863 the United States Congress established the Territory of Idaho, but specifically exempted all Indian territory from the Territory of Idaho. 12 Stat. 808, ch. 117.

9. On November 8, 1873, by Executive Order, the Coeur d'Alene Reservation was established within the aboriginal homeland of the Coeur d'Alene Tribe as follows:

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians, in said Territory, viz: Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks, directly

south of a point on said last-named creek, 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission, on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in, or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington, as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence south along said dividing line to the top of the dividing range between Pine and Latah (or Hangman's) Creek; thence along the top of said ridge to the place of beginning.

The beds, banks and waters of all of Lake Coeur d'Alene, the Coeur d'Alene River downstream from Cataldo and all lakes lateral to such reach of the Coeur d'Alene River, the St. Joe River downstream from St. Maries and all lakes lateral to such reach of the St. Joe River, and the southern half of the Spokane River from Lake Coeur d'Alene to the boundary between Washington and Idaho are included in the 1873 Coeur d'Alene Reservation.

10. In 1889, the Coeur d'Alene Tribe ceded to the United States toe approximate northern one-third of the upland areas of the 1873 Reservation. The 1889 cession agreement described the area ceded as follows:

Beginning at the northeast corner of the said reservation, thence running along the north



boundary line north 67 29' west to the head of the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line twelve miles; thence southerly along west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary of the said reservation; thence northerly along the said east boundary line to the place of beginning.

26 Stat. 1030 (1891).

11. In 1894, the Tribe ceded to the United States a one-mile strip of upland known as the "Harrison Strip," as follows:

Beginning at a point on the north line of the reservation, on the east bank of the mouth of the Coeur d'Alene River, and running due south one mile, thence due east parallel with the north line to the east boundary line, thence north on the east boundary line to the northeast corner of the reservation, thence west on the north boundary line to the point of beginning.

Act of August 15, 1894, ch. 290, 28 Stat. 322.

12. In 1908, the United States, without tribal consent as required by the 1887 Agreement between the Tribe and the United States, withdrew from allotment and settlement and reserved certain lands known as "Heyburn State Park" as follows:

Sections one, two and twelve, township forty-six north range four west, Boise meridian; sections

thirty-five and thirty-six township forty-seven north, range four west, Boise meridian; al [sic] of those portions of sections two, three, four, five, six, seven, eight, nine, ten, and eleven, township forty-six north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township; all of those portions of sections thirty-one and thirty-two, township forty-seven north, range three west, Boise meridian, lying south and west of the Saint Joe River in said township.

35 Stat. 79. See attached map (Exhibit 1).

13. By virtue of the above-described 1889 and 1894 cession agreements and the 1908 withdrawal and reservation, the Coeur d'Alene Tribe did not at any time cede to the United States any of those portions of the bed and banks of navigable watercourses or waters within the Coeur d'Alene 1873 Reservation. The Coeur d'Alene Tribe continues to hold aboriginal or Indian title to the beds and banks of such navigable watercourses and waters. The Coeur d'Alene Tribe also, or in the alternative, holds the beneficial interest in the beds and banks of such navigable watercourses and waters subject to the trusteeship of the United States.

14. The Coeur d'Alene Tribe and its members are now in possession of the said bed and banks of all navigable watercourses and waters located within the 1873 Coeur d'Alene Indian Reservation.

15. By virtue of the Idaho Admission Bill the State was admitted to the Union in 1890. Idaho Admission Bill § 1 (1890). 26 Stat. 215. Such Admission Bill accepted and ratified the fact that Article XXI, Section 19 of Idaho's

Constitution disclaimed all right and title to lands owned or held by any Indians or Indian tribes located within its borders.

16. The State is claiming some right, title or interest to all of the beds, banks of the navigable watercourses and waters within the 1873 Coeur d'Alene Reservation, including the subject beds, banks and waters, and is also asserting the right to possession of those lands, waters and rights thereon. See Idaho Code § 58-1304 (formerly Idaho Code § 58-142), 67-4304. The claims of the defendant are null and void and of no effect. The State's claimed water right is subordinate to the Tribe's aboriginal water rights and reserved water rights.

17. The construction of docks, piers, float, pilings, breakwaters, boat ramps and other such aids to navigation upon the beds and banks of navigable lakes is permitted in Idaho only upon the payment of fees to the State. See Idaho Code, § 58-1307 (formerly Idaho Code § 58-148).

18. Pursuant to Idaho Code, § 58-1306 (formerly Idaho Code § 58-147) the State, without the permission or consent of the United States or the Tribe, has approved and issued permits for the construction of docks, piers, floats, pilings, breakwaters, boat ramps and other such aids to navigation.

19. The Coeur d'Alene Tribe is entitled to a judgment: (1) quieting its title to the beds and banks of navigable watercourses and waters within the 1873 Coeur d'Alene Reservation under its aboriginal or Indian title and/or as the beneficially interested party of the trust relationship with the United States to be held for the use and benefit

of the Coeur d'Alene Tribe and its members; (2) upholding the right of exclusive use, occupancy and possession of the Coeur d'Alene Tribe and its members to those beds and banks of navigable watercourses and waters and enjoining the State's interference therewith, and (3) declaring that the defendants have no right to title or interest in such beds and banks of navigable watercourses and waters and no right of possession thereof.

20. The Coeur d'Alene Tribe will continue to suffer irreparable injury unless judgment is entered by this Court upholding their title and right to exclusive use, occupancy and possession of the bed and banks of navigable watercourses and waters situate within the 1873 Coeur d'Alene Reservation and enjoining the State's interference therewith. The Plaintiff has no other adequate remedy at law.

21. The Coeur d'Alene Tribe is entitled to recover its costs and attorney fees incurred in this action.

## V.

### Answer to Counterclaim

22. The Tribe admits the factual allegations contained in the State's First Counterclaim paragraphs 6.1, 6.2, 6.3, 6.4.

23. The Tribe generally denies all of the factual allegations and legal conclusions contained in the State's First Counterclaim.

24. The Tribe admits factual allegations contained in Second Counterclaim in that portion of paragraph 7.1 which incorporates 6.1, 6.2, 6.3 and 6.4 and in that portion



of paragraph 7.3 which incorporates paragraphs 5.2.1, 5.4, 5.5.

25. The Tribe generally denies all other factual allegations and legal conclusions contained in the Second Counterclaim.

26. The Tribe has incurred costs and fees in defense of this Counterclaim.

VI.

Affirmative Defenses to Counterclaim

The Coeur d'Alene Tribe asserts the following Affirmative Defenses to the Counterclaim.

1. The Counterclaim fails to state a claim upon which relief can be granted.

2. Count Two of the Counterclaim is barred by res judicata and collateral estoppel.

3. Count Two of the Counterclaim is barred by the State's material breach of any lease to Heyburn Park that it may have, thereby reverting all incidents of ownership to the Tribe and the United States solely as the Tribe's trustee.

WHEREFORE, the Coeur d'Alene Tribe prays that this court enter judgment and decree as follows:

1. Quieting the title of the Coeur d'Alene Tribe to the bed and banks of navigable watercourses and waters within the 1873 Coeur d'Alene Reservation under aboriginal or Indian title and/or as the beneficially interested party of trusteeship of the United States to the recognized title thereof;

2. Declaring that the Coeur d'Alene Tribe and its members are entitled to the exclusive use, occupancy, possession and right to the quiet enjoyment of the beds and banks of navigable watercourses and waters within the 1873 Coeur d'Alene Reservation.

3. Declaring that the State has no right to title or otherwise interest in or to the beds and banks of navigable watercourses and waters within the 1873 Coeur d'Alene Reservation.

4. Declaring that the water right issued by the State pursuant to 67-4304 is invalid or inferior to the aboriginal and/or reserved water rights of the Tribe.

5. Preliminary and permanently enjoining the State from asserting any right, title or otherwise interest in or to the beds and banks of navigable watercourses and waters within the 1873 Coeur d'Alene Reservation or from otherwise interfering in any way with the exclusive use, occupancy or possession of such beds and banks of navigable watercourses and waters by the Coeur d'Alene Tribe and its members;

6. For the costs and attorney fees of this action.

7. For such other relief that the Court may deem appropriate.

DATED this 20 day of October, 1994.

/s/ Raymond C. Givens  
RAYMOND C. GIVENS  
Attorney for Coeur d'Alene Tribe

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